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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 77

UNITED STATES OF AMERICA, APPELLANT

v.

THOMAS WILLIAM WELLER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the United States District Court for the Northern District of California (A. 31-42)[1] is reported at 309 F. Supp. 50.

JURISDICTION

On September 19, 1969, the district court entered an order granting appellee's motion to dismiss an

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[1] "A." refers to the Appendix in this Court. "R." refers to the original record. "Exh. A." refers to appellee's Selective Service file (Exhibit A to the motion to dismiss the indictment).

indictment charging him with refusal to submit to induction as ordered, in violation of 50 U.S.C. App. 462(a), on the ground that appellee had improperly been denied the right to be represented by counsel at a personal appearance before his local Selective Service board (A. 31-42). A notice of appeal to this Court was filed on October 17, 1969, in the belief that the "motion in bar" branch of the Criminal Appeals Act (18 U.S.C. 3731) was applicable to the district court's order (A. 43). On more extensive consideration, however, the government moved the Court on January 16, 1970, to remand the case to the Court of Appeals for the Ninth Circuit as involving an appeal from a "decision * * * dismissing [an] indictment" *not* predicated upon "invalidity or construction" of the underlying statute; a request was made to have the motion treated as a jurisdictional statement if the Court decided the case was or might be directly appealable (Gov't Motion to Remand, No. 1082, 1969 Term, p. 10, n. 2).

On March 23, 1970, the government's motion was denied and further consideration of the jurisdictional question was postponed to the hearing of the case on the merits (A. 44). In our view, the ruling below should be viewed neither as the granting of a "motion in bar" prior to the defendant's being put in jeopardy, nor as a decision dismissing an indictment based upon the construction of the underlying statute. On this basis, this Court is without jurisdiction to consider the case on direct appeal. Accordingly, the instant case should be remanded to the court of appeals under the explicit procedure set

forth in the Criminal Appeals Act governing such situations (see App. A, *infra*, pp. 55-56).

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over this direct appeal.

2. Whether the prohibition of 32 C.F.R. 1624.1 (b) on a registrant's being represented by counsel when making a personal appearance before his local Selective Service board is unauthorized by statute or constitutionally invalid as inconsistent with due process.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Criminal Appeals Act (18 U.S.C. 3731), Section 10(b) of the Military Selective Service Act of 1967 (50 U.S.C. App. 460 (b)), and the pertinent Selective Service regulations (32 C.F.R. 1604.41, 1604.71, 1624.1, and 1624.2) are set forth in Appendix A, *infra*, pp. 55-61.

STATEMENT

On January 15, 1969, appellee was charged in a single-count indictment, in the United States District Court for the Northern District of California, with refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a) (A. 2).

Prior to trial, appellee moved to dismiss the indictment on the ground, *inter alia*, that he had been denied the right to counsel at a personal appearance before his local board (A. 3-4). In a supporting

memorandum (R. 7-28), he asserted that the regulation prohibiting representation by counsel at such appearances (32 C.F.R. 1624.1(b)) was unconstitutional as violative of due process (R. 7-26) and, alternatively, was not authorized by the Military Selective Service Act (R. 23-24).

Appellee's Selective Service file, which the district court considered in ruling on his motion (A. 31), reveals the following pertinent facts:

Appellee registered with Local Board No. 22, Sacramento, California, in 1962 and, following several intermediate classifications, was classified I-A in July 1967 (A. 5-6; Exh. A, p. 2). On August 10, 1967, he filed with the board a completed SSS Form 150 claiming status as a conscientious objector (A. 6; Exh. A, pp. 77-82). The board rejected the claim and again classified him I-A (A. 6; Exh. A, p. 88), whereupon appellee, pursuant to 32 C.F.R. 1624.1 and 1624.2, requested a personal appearance before the board to discuss his classification (A. 6, 9-10). The board scheduled such an appearance for November 8, 1967 (A. 11). On November 6, 1967, appellee's attorney advised the board by letter that appellee desired the attorney to be present at the appearance and requested permission to attend (A. 12-13). Relying on 32 C.F.R. 1624.1(b), the board refused the request (A. 14-15),[2] and, following appellee's per-

[2] The attorney had also requested that appellee be permitted to bring witnesses to the hearing to attest to the sincerity of the C.O. claim and had asked that a stenographer be present to record the proceedings (A. 12). The board advised counsel that appellee should have the persons whom

sonal appearance, retained his I-A classification, declining to reopen the case (A. 7). After unsuccessfully appealing the local board's determination within the Selective Service System, appellee was ordered to report for induction (A. 7, 30). He reported for but refused to submit to induction (A. 8), and this prosecution followed.

The district court found that the proviso of the regulation cited by the local board as the basis for prohibiting representation by counsel at personal appearances was not authorized by statute (A. 31-42). Notwithstanding that this prohibition has been a part of the Selective Service law since the parent statute was passed in 1940, and that it has been sustained by numerous courts of appeals (see A. 36), the court below held that, absent "explicit action" (A. 32, 33) by Congress, a general delegation of power to prescribe local board procedures (as provided in 50 U.S.C. App. 460(b)(1)), was not sufficient to warrant the conclusion that Congress had expressly empowered the President to promulgate the questioned regulation. In so holding, the district court was careful to circumvent deciding directly the constitutional question; however, basic to its determination was an underlying assumption that the regulatory prohibition had a "taint of doubtful constitutionality" (A.

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he desired as witnesses submit their proposed testimony in writing and that any submitted statements would be considered by the board (A. 14). It declined, however, in the exercise of its discretion, to permit stenographic recording of the proceedings (A. 15). The proceedings at the personal appearance were informally recorded and summarized by the chairman (A. 16-17; Exh. A, pp. 98-99).

40). Accordingly, the court below concluded that the "constitutionally-suspect" (A. 33) regulation could not be sustained for want of explicit statutory authorization.

SUMMARY OF ARGUMENT

I

In its order denying appellee's motion to remand the instant case to the Court of Appeals for the Ninth Circuit, this Court postponed further consideration of the jurisdictional question to the hearing of the case on the merits (A. 44). Since that time, this Court has handed down its decision in *United States* v. *Sisson*, No. 305, 1969 Term, discussing at some length the question of direct appeals to this Court under various branches of the Criminal Appeals Act. Although *Sisson* can be distinguished from the present case on the ground that "jeopardy" had there attached, while here the indictment was dismissed prior to trial, in our view the Court's opinion in that case lends support to our position here that a direct appeal from the ruling below does not lie to this Court.

The decision of the district court does not come within the "motion in bar" provision of the Criminal Appeals Act. Both the provisions of the 1907 Act and its legislative history indicate that Congress was using the term "plea in bar" in its common law meaning, or as something different from a demurrer. Here, however, what the defendant raised by his motion was a claim that the indictment did not charge an offense; he was not claiming that although an offense

had been committed he could not for some extraneous reason be prosecuted therefor. Accordingly, we do not believe his motion can properly be treated as raising a plea in bar.

Instead, the decision of the district court seems to us to be the sustaining of a demurrer based on the indictment as amplified by agreed facts. As such, it is clearly appealable under 18 U.S.C. 3731, but, in our view, the appeal lies to the court of appeals. The ruling below is not one predicated directly on a construction of the underlying statute—either 50 U.S.C. App. 462(a) or any substantive provision. Nor does the regulation in question—barring the presence of counsel for registrants before local boards—seem so inextricably intertwined with the underlying statute as to bring the ruling within the rationale enunciated in *United States* v. *Mersky*, 361 U.S. 431.

Since the dismissal of the indictment is not appealable directly to this Court under either the "motion in bar" or "decision * * * dismissing" branches of the Criminal Appeals Act, we submit that the instant case should be remanded to the court of appeals under the explicit procedure set forth in the Act governing such situations. We recognize, however, that this Court has already given a preliminary indication that it can properly entertain a direct appeal from the ruling below. Accordingly, we have proceeded to brief the merits for consideration by this Court in the event it should disagree with our position on the jurisdictional question.

II

The Selective Service regulations, insofar as here relevant, give registrants the right to appear in person before their local boards to discuss, or seek to change, classifications assigned them on the basis of information supplied in their written questionnaires. The regulations provide, however, that "no registrant may be represented before the local board by anyone acting as attorney or legal counsel" (32 C.F.R. 1624.1(b)). This prohibition was issued within the intended scope of authority delegated to the President under the Selective Service Act and has been specifically ratified by Congress after careful and purposeful consideration in both the House and the Senate. Its enforcement, in the context of a nonadversary proceeding before a local board, is not inconsistent with the constitutional requirements of procedural due process.

A. Assuming *arguendo* that the questioned regulation is of doubtful constitutionality, the proper inquiry for disposition of the "authorization" issue is whether Congress, either by direct action or by considered and purposeful inaction, evidenced a specific intent to delegate to the President, under the general enabling language of the Selective Service Act, authority to promulgate a regulatory prohibition against representation by counsel at personal appearances before local boards. By restricting its consideration of this question to a narrow reading of Sections 1(c) and 10(b)(3) of the Act, the district court erroneously disregarded the derivations of the present regulation and ignored the direct attention afforded this

precise prohibition in hearings before the House Armed Services Committee and during debate on the floor of the Senate.

Promulgated by each of two Presidents, initially under the Selective Training and Service Act of 1940 and later under the Selective Service Act of 1948 (recently renamed the Military Selective Service Act of 1967), the regulation prohibiting representation by counsel at local board appearances has been a basic part of the Selective Service law for nearly 30 years. During this time Congress has, on at least four separate occasions, substantially reenacted or broadly revised and amended the basic conscription statute without any alteration or repudiation of the regulatory prohibition.

Moreover, a review of the 1967 Act and its legislative history demonstrates that the regulation was discussed at length during consideration of the most recent amendments to the Selective Service laws. Thus, in hearings before the House Armed Services Committee in 1966, the questioned prohibition came under direct attack and was afforded special attention by General Hershey in his reply before the Committee to critics of the Selective Service System. This precise focus notwithstanding, the Committee reported out the bill which was to become the 1967 statute without proposing any amendment affecting the prohibition; nor was any change in this regard offered during proceedings before the House. When the bill came before the Senate, the regulation was again called into question and a floor amendment was proposed explicitly providing for representation by coun-

sel at personal appearances before the local boards. After extended debate, a vote was taken and the amendment was defeated by a substantial margin.

The 1967 Act in its final form did incorporate an amendment giving statutory recognition for the first time to the office of government appeal agent, which has the function of furnishing legal services both to the registrants and to the local boards. This amendment's legislative history reflects the careful consideration given by Congress to a registrant's need for legal assistance in attempting to alter his draft classification. The affirmative choice to expand the category of lawyers eligible for service as government appeal agents (through elimination of the exclusion of lawyers in Reserve components of the Armed Forces), rather than to rescind the regulation proscribing representation by private counsel, evinces an explicit congressional decision to ratify the challenged procedure.

B. The denial to registrants of representation by counsel at personal appearances before their local draft boards is not inconsistent with procedural due process. Assuming *arguendo* that the Due Process Clause of the Fifth Amendment requires a registrant be afforded the right to appear in person before his local board to protest his draft classification, it does not follow therefrom that the same constitutional considerations mandate that he be permitted representation by counsel at such proceedings. Fundamental distinctions between personal board appearances and conventional adversary proceedings of a judicial or quasi-judicial character have long

been a basis for lower courts' consistent refusals to impose on the former, under the guise of due process, the full panoply of judicial procedures. Indeed, it was in tacit recognition of these basic differences that Congress decided specifically to exempt proceedings under the Selective Service Act from the requirements of the Administrative Procedure Act. The suggestion by the district court that denial to registrants of representation by counsel violates traditional safeguards of procedural due process thus ignores the nature and function of the Selective Service process and erroneously seeks to transform the Selective Service System into an accusatorial or prosecutorial agency.

Since a personal board appearance is in fact a nonadversary proceeding, a determination as to whether the elusive and variable concept of "due process" precludes the denial of representation by counsel at such proceeding depends on the careful balancing of a complex of factors. Private interests of registrants must be weighed carefully against the public need for a Selective Service System with the capacity to provide necessary manpower for the Armed Forces of the United States in a speedy and efficient manner. In this context, it is relevant to consider not only the possible advantages to registrants but also the formidable questions raised by the district court's suggestion that personal board appearances be transformed into trial-like proceedings—*e.g.*, representation of local boards as well by counsel; appointment of counsel for indigent registrants where necessary; existence of a correlative right to subpoena, confront and cross-examine adverse witnesses; steno-

graphic recording of all board proceedings; statement of reasons for an assigned classification by local boards. Even apart from these considerations, the resultant burdens that representation by counsel would predictably impose on the speedy and effective administration of the Selective Service System, and especially on local boards ill-equipped to deal with such a development, outweigh the marginal gains to registrants, particularly when the non-judicial nature of personal appearances and the legal advice and assistance already otherwise available to registrants contesting their classifications are considered.

No decision of this Court supports the proposition that there exists a Fifth Amendment right to counsel at personal board appearances. *In re Gault*, 387 U.S. 1, which held due process required that a juvenile charged with delinquent behavior be afforded the right to be represented by counsel at juvenile proceedings, clearly cannot be read so broadly. There the Court was most careful to predicate its decision on the fact that the juvenile proceeding was accusatorial in nature and presented the awesome prospect of incarceration of delinquents. Similarly, *Goldberg* v. *Kelly*, 397 U.S. 254, is inapposite. In that case the holding was that due process entitled welfare recipients to an *evidentiary hearing*, including the right to confront and cross-examine adverse witnesses and be represented by retained counsel, prior to termination of their assistance payments. The conventional adversary proceeding contemplated by the *Goldberg* decision is wholly unlike the proceeding under the Selective Service Act. Decisions more nearly in point,

and supporting the view urged here by the government, are *United States* v. *Nugent*, 346 U.S. 1, *In re Groban*, 352 U.S. 330, and *Anonymous* v. *Baker*, 360 U.S. 287.

ARGUMENT

I. This Court Is Without Jurisdiction to Entertain a Direct Appeal and Should Transfer This Case to the Court of Appeals for the Ninth Circuit.

In our earlier motion to transfer this case to the Court of Appeals for the Ninth Circuit, we argued that this Court lacked jurisdiction to entertain a direct appeal since the ruling below could neither be properly considered as the granting of a "motion in bar" prior to defendant's being put in jeopardy nor as a decision dismissing the indictment based on a construction of the underlying statute. On March 23, 1970, our motion was denied; however, the Court postponed further consideration of the jurisdictional question to the hearing of the case on the merits. Subsequent to that determination, the Court decided, solely on jurisdictional grounds, *United States* v. *Sisson*, No. 305, 1969 Term, decided June 29, 1970, and had occasion in that case to examine at some length the question of direct appeals under the various branches of the Criminal Appeals Act. Although *Sisson* is clearly distinguishable from the instant case on the ground that there "jeopardy" had attached, while here the indictment was dismissed prior to trial, it is our view that the opinion in *Sisson* lends support to our earlier submission, renewed here, that a direct appeal from the ruling below does not lie to this Court.

The motion below—to dismiss the indictment because the regulation prohibiting representation by counsel at personal appearances before local boards is unauthorized or, alternatively, unconstitutional—does not, as we see it, come within the intended scope of the statutory term "motion in bar." While this Court has "not settled on a general approach to be taken in interpreting [the motion in bar] provision" (*United States* v. *Sisson*, *supra*, slip. op., pp. 30-31),[3] there seems to be little dispute that both the parent 1907 Act and its legislative history indicate Congress was using the term "plea in bar" as that term was used at common law. Thus, a sponsor of the 1907 legislation explained that a "special plea in bar is that which is set up as a special defense notwithstanding the defendant may be guilty of the offenses with which he is charged" (Senator Patter-

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[3] Cf. *United States* v. *Mersky*, 361 U.S. 431. While the Court did not reach the motion in bar issue, Mr. Justice Brennan, concurring, adopted the broad position that a decision sustaining a motion in bar is any judgment "which will end the cause and exculpate the defendant" (*id.* at 441). Justices Frankfurter, Harlan and Stewart, dissenting, argued that the scope of appeals granted under this branch was limited solely to the category of motions included within the common law concept of a special plea in bar (*id.* at 455-458). See generally *United States* v. *Sisson*, *supra*, slip op., pp. 30-31, nn. 53, 54. See also *United States* v. *Fix*, No. 25,216, decided July 1, 1970, where the Court of Appeals for the Ninth Circuit certified to this Court an appeal from a dismissal of an indictment brought under 50 U.S.C. App. 462 (a), concluding the motion in the district court was within the "motion in bar" provision of the Criminal Appeals Act on the basis of a broad reading of the decision in *United States* v. *Blue*, 384 U.S. 251.

son, 41 Cong. Rec. 2753). Or, as the dissenting opinion in *Mersky* phrased it (361 U.S. at 457):

> The plea in confession and avoidance did not contest the facts alleged in the declaration, but relied on new matter which would deprive those facts of their ordinary legal effect. * * * It set up affirmative defenses which would bar the prosecution.

Examples of motions in bar under this definition include claims of *res judicata*, statute of limitations, immunity and denial of speedy trial.

While the Court in *Sisson* did not reach the question whether the term "motion in bar" should be so restricted, it did state that "[b]ecause the Criminal Appeals Act * * * has descended unchanged in substance from the original Criminal Appeals Act * * * the crucial focus * * * must be the legislative history of the 1907 Act" (*United States* v. *Sisson, supra*, slip op., pp. 23-24). That this led the Court to construe the statute strictly was shown in its discussion of a different aspect of the statutory provision here under consideration, when it said (pp. 34-35):

> The language of the motion-in-bar provision itself limits appeals to those granted "when the defendant has not been put in jeopardy." *We read that limitation to mean exactly what it says* * * * [emphasis added].

The often expressed policy of this Court to "construe the Criminal Appeals Act as confining the Government's right to appeal" (*United States* v. *Sisson, supra*, slip op., p. 33; cf. *United States* v. *Borden Co.*, 308 U.S. 188, 192), was of major influence in the

Sisson decision and points toward the statutory construction we propose here. It is true that this case does have some elements of confession and avoidance, since the defendant by his motion does not deny that he failed to report for induction as ordered, but argues that he cannot be prosecuted because the procedure underlying the order was invalid. Nevertheless, we do not believe that his motion can properly be treated as raising a plea in bar. It is a foundation of any prosecution under Section 12(a) that the order disobeyed must be a valid order. Thus, what the defendant raised by his motion was a claim that the facts which would be shown on a trial of the indictment would not constitute an offense; he was not claiming that although an offense had been committed, he could not for some extraneous reason be prosecuted for it (A. 3).

In this light, the decision of the district court is more analogous to the sustaining of a demurrer based on the indictment as amplified by agreed facts[4]—a so-called "speaking demurrer." As such, it is clearly appealable under 18 U.S.C. 3731, but the question remains where the appeal lies. The statute provides for a direct appeal to this Court from a decision dismissing an indictment when the decision is "based upon the invalidity or construction

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[4] In *Sisson*, the Court noted by way of dictum that it "has never held that an appeal lies from a decision which depends not upon the sufficiency of the indictment alone, but also on a stipulation of the parties" (slip op., p. 16). Thus, it may well be that we need go no further in demonstrating that the Court is here without jurisdiction to entertain a direct appeal. But see *United States* v. *Halseth*, 342 U.S. 277; *United States* v. *Lem Hoy*, 330 U.S. 724, 725.

of the statute upon which the indictment * * * is founded." All other district court decisions in effect sustaining a demurrer to an indictment are appealable to the court of appeals.[5] The specific issue in this case then, as stated in our motion to remand, is whether the district court's holding—that the indictment must be dismissed because the regulation forbidding counsel to be present on behalf of a registrant before the local board is unauthorized by the Selective Service Act—is "based upon the * * * construction of the statute upon which the indictment * * * is founded."

Here a "construction of the statute" is ultimately involved in the district court's determination to dismiss, since it found the regulation to be unauthorized. But this situation resulted only from the assertions made in the motion to dismiss. Thus, the decision below is *based* on the regulation and the fact, alleged in the motion to dismiss, that the defendant had been denied counsel before the local board. Without them, there would be no question before the Court.

In *United States* v. *Mersky, supra*, a case charging the defendant with violating regulations promulgated pursuant to an import statute, this Court held that the regulations directly implemented and amplified the statute in terms of defining the conduct prohibited

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[5] While the statute, literally read, allows appeals to the court of appeals from any dismissal of an indictment not appealable to this Court, it has been interpreted as not reaching orders based on motions which are not in the nature of a demurrer or plea in abatement. See *United States* v. *Apex Distributing Co.*, 270 F.2d 747 (C.A. 9) (*en banc*). That issue is not involved here.

and that, in these circumstances, a decision construing the regulations was a decision construing the underlying statute. In other words, where the statute and regulation are so "inextricably intertwined" that interpretation or invalidation of the regulation necessarily involves a construction of the statute, a direct appeal is proper. Applying the *Mersky* rationale in *United States* v. *Eisdorfer*, No. 330, 1969 Term, appeal dismissed, 396 U.S. 1066, arising under the "motion in arrest" branch of the Criminal Appeals Act, we took the position that a direct appeal could be taken to this Court from the district court's decision granting the appellee's motion where the ruling below was premised on the invalidity of the delinquency regulations promulgated under the Selective Service Act because they failed to set forth a sufficient standard governing their use. In our view, an indictment charging failure to obey an order to report for induction in violation of 50 U.S.C. App. 462(a) contains an implicit allegation that the order was valid. Interpretation of the regulation invalidated in *Eisdorfer*, which went directly to the legality of the registrant's classification there, thus amounted to a construction of the underlying statute within the meaning of *Mersky*.

This case is one step removed from the situation in *Eisdorfer*. The regulation here invalidated does not go to a registrant's classification as such, but rather to the process by which the local board determines the classification. Accordingly, to apply the *Eisdorfer* rationale here it is necessary to argue that the issue of the legality of appellee's classification,

which goes to the validity of the order to report, is encompassed in the charge of disobedience to the order and that the regulation bearing upon the process by which the local board determines the classification in turn conditions the legality of the classification. While the district court was doubtless justified in concluding that the invalidity (in its view) of the process is sufficiently connected with the charge of wilful disobedience to justify dismissal of an indictment under Section 12(a), it is doubtful that the court's decision can properly be deemed to involve a construction of the statute on which the indictment is founded under 18 U.S.C. 3731, as delineated in *Mersky*. Indeed, the whole thrust of *Mersky* is directed toward situations where the statute and regulation are essentially complementary. The Court there referred to the fact that the regulations at issue were "called for by the statute" (361 U.S. 438), and that "the construction of one necessarily involves the construction of the other," since "neither the statute nor the regulations are complete without the other, and only together do they have any force" (*ibid.*). By contrast, the regulations here were invalidated below expressly because it was found to lack statutory authorization, both as to the underlying statute and as to any other substantive provision of the Selective Service Act. While we oppose that holding, it serves to point up how far removed the present case is (even assuming, as we do, congressional authorization) from the situation in *Mersky*, where the regulation in issue was substantively so much a part of the statute as to eliminate on its face any

possible question of statutory authorization. Despite the great importance of the regulation to the effective administration of the Selective Service process, it is nonetheless not one that is so specifically and necessarily contemplated by explicit provisions of the Act that, without it, the statute would be incomplete and without force in the *Mersky* sense.

In sum, we adhere to our previous conclusion that it would extend the *Mersky* rationale too far to read the decision below as a construction of 50 U.S.C. App. 462(a), the statute on which the indictment was founded.[6] As we have contended, the statute is involved only because of the regulation and the fact asserted in the motion below that the registrant had not been permitted counsel at his local board appearance. Thus, the judgment below was *based on* the regulation and this additional fact and not on a construction of the underlying statute. It follows that the instant case should be transferred to the court of appeals under the explicit procedure set forth in the Criminal Appeals Act governing such situations. Since appellee's motion below clearly constituted an attack

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[6] In *Sisson* (slip op., p. 11, n. 9), the Court properly recognized that as "a matter of sound construction * * * 'statute upon which the indictment * * * is founded' should be read to include the entire *statute*, and not simply the penalty provisions" (emphasis added), citing *United States* v. *Socony Mobil Oil Co.*, 252 F.2d 420 (C.A. 1), appeal dismissed per stipulation, 356 U.S. 925, and *United States* v. *Mersky*, *supra*. However, any thought that the Court by this statement might have been suggesting the inclusion of procedural regulations, such as the one involved here, as within the scope of the term "statute" is dispelled by its repeated emphasis throughout the opinion on a "strict construction" of the Criminal Appeals Act.

upon the sufficiency of the indictment under Rule 12, F. R. Crim. P., the decision below granting the motion and dismissing the indictment is appealable to the court of appeals, provided this Court accepts our submission that it does not come within either of the two branches of the Criminal Appeals Act which allow appeal solely to this Court. See *United States* v. *Apex Distributing Co.*, 270 F.2d 747 (C.A. 9) *(en banc)*.

Mindful of the fact that this Court has already given a preliminary indication that it may entertain a direct appeal in this case, however, we have proceeded to brief the issues on the merits for consideration by this Court in the event it disagrees with our position on the jurisdictional question.

II. The Selective Service Regulation Prohibiting Representation by Counsel at Personal Appearances before Local Draft Boards Is Authorized by Statute and Is Constitutionally Valid.

The regulation here in question—32 C.F.R. 1624.1 (b)—provides in pertinent part that "no registrant may be represented before the local board by anyone acting as attorney or legal counsel." The district court, professing doubts as to the constitutionality of this regulatory prohibition, held that it could not stand in the absence of explicit statutory authorization. Concluding that presidential power to promulgate such a regulation derives solely from congressional legislation, and not from any implied constitutional powers the President might possess as Commander-in-Chief of the Armed Forces (A. 33), the court below rested its decision simply on a reading of

the general enabling provisions of the Selective Service Act. Even assuming that Congress alone can authorize denial of counsel in local board proceedings,[7] we think the conclusion reached by the district court is contrary to the clearly manifested legislative intent on this matter. In addition, the decision below ignores the implicit holding of every court that has heretofore had occasion to consider the challenged regulation. Finally, we submit, the regulation is not inconsistent with the requirements of procedural due process under the Fifth Amendment.

A. *The regulation has been specifically authorized by Congress.*

Before considering the correctness of the district court's suggestion that the regulation is of doubtful constitutionality, the initial question for the Court is whether Congress has made an explicit decision that the denial of counsel at personal board appearances is necessary and warranted and has thus authorized this procedure either by direct action or by careful and purposeful inaction. *Greene* v. *McElroy*, 360 U.S. 474, 506-507. The court below, in disposing of this

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[7] In so assuming, the government does not intend to concede that the President is without power to promulgate the challenged regulation under Art. II, Sec. 2, of the Constitution. On numerous occasions, however, this Court has indicated that questions involving allocations of power by the Constitution between the executive and legislative branches of government, particularly as to matters involving war, the national defense and the Armed Forces, present non-justiciable controversies of a political nature that should not properly be brought before the Court. Cf. *Mora* v. *McNamara*, 389 U.S. 934.

issue merely by quoting the general statutory provisions empowering the President to devise rules and regulations necessary to effectuate the policies of the Selective Service Act (50 U.S.C. App. 460(b)(1), 460(b)(3)), unduly restricted the proper scope of judicial inquiry. An "explicit congressional decision" should not be considered any less explicit because reflected in a statute's legislative history rather than embodied in its precise language. Cf. *Hannah* v. *Larche*, 363 U.S. 420, 438.

1. The provision against representation by counsel at local board appearances first appeared in its present form on August 20, 1948, in Executive Order 9988, promulgated by President Truman under the Selective Service Act of 1948.[8] It finds its genesis, however, in an earlier executive order, issued by President Roosevelt on October 4, 1940 under the parent Selective Training and Service Act,[9] which remained in effect throughout World War II. Thus,

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[8] See 32 C.F.R. 624.1(b) (13 Fed. Reg. 4851, 4859); the regulation was redesignated "1624.1(b)" in 1949 (14 Fed. Reg. 5021).

[9] As promulgated by President Roosevelt, the regulation read: "At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for this purpose. If the registrant does not speak English adequately, he may appear with a person to act as interpreter for him. *No registrant may be represented before the local board by an attorney*" (emphasis added) (Selective Service Regulation 369(a) (32 C.F.R. (1940 Supp.) 603.369(a)), promulgated by Exec. Ord. No. 8560 of October 4, 1940 (5 Fed. Reg. 3923, 3932)). The regulation was amended in a respect not here pertinent, and redesignated "625.2(a)", in 1941 (6 Fed. Reg. 6843) (see 32 C.F.R. (1941 Supp.) 625.2(a)).

the questioned regulation has been an explicit part of the Selective Service laws for almost 30 years. In that time Congress has twice reenacted the basic conscription law without substantial change—once in 1946 and again in 1948—and has twice broadly revised and amended it—in 1951 and 1967; [10] but on none of these occasions has it seen fit to change or rescind the challenged proscription of representation by counsel. In failing to consider this background, we think it clear that the court below construed too narrowly the intent of Congress as to the scope of presidential power delegated under the Act's broad enabling provisions.[11] As this Court has often recog-

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[10] The Selective Training and Service Act of 1940 (54 Stat. 885) was reenacted in 1946 except as to certain specified provisions (Act of June 29, 1946, § 1, 60 Stat. 341). The 1946 Act expired by operation of law on March 31, 1947 (§ 7, 60 Stat. 342), but fifteen months later Congress reactivated the draft with the enactment of the Selective Service Act of 1948 on June 24 of that year (62 Stat. 604). In 1951, the 1948 Act was broadly amended and redesignated the Universal Military Training and Service Act (65 Stat. 75). In 1967, the Act was again substantively revised and renamed the Military Selective Service Act of 1967 (81 Stat. 100).

[11] Section 10(b)(1) of the present Act (50 U.S.C. App. 460(b)(1)) empowers the President "to prescribe the necessary rules and regulations to carry out the provisions of" the Act. Section 10(b)(3) vests in local boards the power "under rules and regulations prescribed by the President" to hear and determine claims respecting exemption or deferment from service (50 U.S.C. App. 460(b)(3)). These provisions have been in effect since 1948 (62 Stat. 619, 620). The corresponding (and identically worded) provisions of the 1940 Act were Sections 10(a)(1) and 10(a)(2) (54 Stat. 893, 50 U.S.C. App. (1940 ed.) 310(a)(1) and 310(a)(2)), respectively.

nized, a consistent and long-continued interpretation of a statute (*i.e.*, as authorizing the promulgation of the regulatory procedure here in question) by the office or agency charged with the Act's enforcement is entitled to great weight in determining the correctness of that interpretation or the existence of claimed authorization for action taken pursuant to such interpretation, particularly when Congress has repeatedly reenacted the statute without repudiating the challenged construction or the alleged authority. *Commissioner* v. *Noel Estate*, 380 U.S. 678, 681-682; *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 241-242; *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366; *Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 449-450; *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116; *Billings* v. *Truesdell*, 321 U.S. 542, 552-553; *Morgan* v. *Commissioner*, 309 U.S. 78, 81; *Helvering* v. *Winmill*, 305 U.S. 79, 82-83. Cf. 2 Sutherland, *Statutes and Statutory Construction*, §§ 5107, 5109 (3d ed. 1943).

2. Moreover, evidence of congressional authorization of the prohibition against representation by counsel at local board appearances is not found in repeated reenactment of enabling legislation alone. Rather, examination of the legislative history of the Military Selective Service Act of 1967 reveals that the questioned regulation remained in effect as a result of an "explicit decision" by Congress.

a. During the 1966 hearings before the House Armed Services Committee which led to the 1967 legislation, Representative Melvin R. Laird, on the urging of a Wisconsin attorney, requested the committee

chairman, Representative L. Mendel Rivers, to direct the committee's attention to the regulatory prohibition and consider a recommendation "that draftees be given an opportunity to appear before their local boards with legal counsel of their choice." [12] In response to this suggestion, the committee reviewed extensively the administrative procedures of local boards and of appeal boards and heard statements on both sides of the right to counsel question (House Hearings, pp. 9889-9890, 9920-9922, 9984-9988). A special invitation was extended to General Lewis B. Hershey to respond to critics of the Selective Service System.[13]

In a prepared statement, General Hershey defended, among other things, the specific procedure under attack here as being necessary and warranted in the context of a "simple" proceeding before a "board composed of the young man's neighbors who are generally without legal training and always uncompen-

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[12] *Review of the Administration and Operation of the Selective Service System,* Hearings before the Committee on Armed Services of the House of Representatives, 89th Cong., 2d Sess., June 22, 23, 24, 28, 29 and 30, 1966 (Doc. No. 75) (hereinafter referred to as "House Hearings"), pp. 9889-9890.

[13] Comments of the critics and General Hershey's replies thereto were incorporated in the printed record of the hearings the relevant excerpts from which are appended hereto as Appendix B, and also were reproduced in a printed interim committee report. See generally House Hearings, pp. 9984-9995; *Review of the Administration and Operation of the Selective Service System,* An Interim Report of the Committee on Armed Services of the House of Representatives, 89th Cong., 2d Sess., August 4, 1966 (Doc. No. 76) pp. 10177-10189.

sated" (House Hearings, p. 9987). Pointing out that all registrants had access to legal assistance through recourse to the services of government appeal agents "charged with the duty of being equally diligent in protecting the interests of the Government and the rights of the registrants in all matters," he emphasized the unfairness that would inhere "to the many who cannot afford to hire attorneys if the sons of other families were permitted to have their cases presented by legal counsel" (House Hearings, pp. 9987, 9988). Nor were these observations made in the abstract. Directing the committee's attention to the legislative history of Public Law 89-332, approved November 8, 1965 (79 Stat. 1281), and entitled "An Act To provide for the right of persons to be represented in matters before Federal agencies," [14] General Hershey quoted directly from a 1965 House Judiciary Committee report (House Hearings, p. 9988):

> In this connection the committee wishes to make clear that the bill would not affect the operations of the boards of the Selective Service System. The functions performed under the Universal Military Training and Service Act are expressly excluded from the operation of the Ad-

[14] The Act provided that any person who was a member in good standing of the bar of the highest court of any State or Territory had a right to represent other persons before any agency upon filing a prescribed declaration that he was authorized to represent the person or persons (Sec. 1(a)). The term "agency" as used in the Act was to have the same meaning as it has in the Administrative Procedure Act (Sec. 3). Proceedings under the Selective Service Act are, with an immaterial exception, specifically exempted from the provisions of the Administrative Procedure Act (50 U.S.C. App. 463(b)).

> ministrative Procedure Act, except those relating to public information. Under regulations prescribed by the President a registrant may not be represented before a local board by an attorney. *This is because of the large number of registrants involved, the informality of procedures, and the need for a capacity to provide large numbers of men quickly for service.* The present bill is designed to do away with special agency bars where Congress has given an affirmative right to representation. It does not extend a right of representation to the Selective Service System, where the right does not now exist. [H. Rep. No. 1141, 89th Cong., 1st Sess. p. 5; emphasis added.]

In the face of this direct focus on the regulatory denial of representation by counsel at local board appearances, the House Armed Services Committee, in reporting out the bill which became the 1967 Act (S. 1432, 90th Cong., 1st Sess.), recommended no amendment to the Selective Service law affecting the challenged procedure. In the House debates that followed, moreover, despite specific reference by Representative Robert W. Kastenmeier to the fact that the bill failed to afford registrants a right to counsel or to personal appearance before an *appeal* board,[15] no pertinent

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[15] Representative Kastenmeier criticized the bill in the following terms: "Under present law, the selective service registrant has neither the right of a personal appearance nor the the right to counsel at an appeal hearing. He is, in effect, outside the due process of law which should protect him as an American citizen, and is effectually deprived of rights which are his under constitutional guarantees. The committee bill, however, would make no provision for extending these rights to the registrant" (113 Cong. Rec. 14119). It should be noted

amendment was proposed from the floor or otherwise. In these circumstances, the House's refusal to incorporate into the Selective Service law a statutory right to representation by counsel reflects clearly its explicit determination to continue the procedure prescribed in the questioned regulation.

b. During debate on the bill in the Senate, Senator Wayne Morse offered from the floor an amendment which, in specific terms, would have afforded to each registrant the opportunity to be represented by counsel before his local board.[16] In support of this change, Senator Morse argued that the local boards were "quasi-judicial" bodies possessing "life and death power over" registrants. He contended that adequate legal assistance could not be provided by government appeal agents, since no attorney could be expected to "serve two masters," and asserted that "in no other area of our legal structure is the defendant forced to have the prosecutor as his attorney" (113 Cong. Rec. 12502).

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that, while the right of a personal appearance is not available before an appeal board, such right is available at a hearing before the local board to protest an assigned draft classification. The right to representation by counsel is not afforded in either situation.

[16] The proposed amendment would have inserted in Section 10(b)(3) of the Act (50 U.S.C. App. 460(b)(3)) a new sentence reading: "Each individual shall be afforded the opportunity to appear in person and be represented by counsel before the local board having jurisdiction over him for the purpose of objecting to the classification assigned to him by such board, and to present testimony or other evidence to the local board regarding the classification assigned to him" (113 Cong. Rec. 12502).

In rebuttal, Senator Richard B. Russell, Chairman of the Senate Armed Services Committee and sponsor of the pending bill, emphasized that the personal appearance is an "administrative" and not a "legal" proceeding. He noted, moreover, that registrants "do have a representative"—the "appeals agent provided by law"—commenting incidentally that the pending bill, as reported out, contained "an amendment pertaining to this matter" (see *infra*, pp. 31-33). Senator Russell further observed that there was a "sociological aspect" involved in that the proposed amendment contemplated that the wealthier registrant, who had the means to employ a lawyer, would have an advantage over the poorer one, who might be unable financially to afford an attorney to plead his case.[17] He added that the Judiciary Committee, as recently as 1965, had "considered this matter carefully" in amending the Administrative Procedure Act (see *supra*, pp. 27-28) and "did not provide for an attorney to appear before local boards" [18] (113 Cong. Rec. 12502-12503).

With the issue thus squarely presented, a vote was

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[17] Senator Morse answered this argument by suggesting that the less affluent registrant could secure representation "on a charity basis" if necessary (113 Cong. Rec. 12503).

[18] Senator Russell noted in response to an inquiry by Senator Samuel J. Ervin that a registrant could have an attorney prepare any affidavit or paper to be filed with the local board; however, counsel could not appear to argue the registrant's case. In response to an inquiry by Senator Edward W. Brooke, Senator Russell affirmed that counsel are not permitted to sit beside the registrant during the personal appearance (113 Cong. Rec. 12503).

taken on the Morse amendment and it was defeated 55 to 17 (113 Cong. Rec. 12503-12504). Such an explicit decision by the Senate not to adopt a contrary procedure, premised on a full and careful consideration of objections to the existing regulation, is precisely the sort of direct congressional action found by this Court to be lacking in *Greene* v. *McElroy, supra.*[19] Cf. *Hannah* v. *Larche, supra*, 363 U.S. at 433-439.

c. As finally enacted, the 1967 Selective Service legislation contained the following proviso:

> *Provided,* That no person shall be disqualified from serving as counselor to registrants, including service as Government appeal agent, because of his membership in a Reserve component of the Armed Forces.[20] * * *

This language was added to the basic conscription law for the express purpose of eliminating what Congress believed to be unnecessary impediments on efforts by the Selective Service System to staff the office of government appeal agent (S. Rep. No. 209, 90th Cong. 1st Sess., pp. 5-6; H. Rep. No. 267, 90th Cong. 1st Sess., pp. 7, 46). That office, conceived by

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[19] In *Greene* the sole suggested basis for inferring congressional authorization or ratification of the Defense Department security clearance procedures there involved lay in the "continued appropriation of funds to finance aspects of" the clearance program (360 U.S. at 504). As this Court noted, the appropriation "could not conceivably constitute a ratification of the hearing procedures" in issue because those procedures "were in no way involved in" the program financed by the appropriation (360 U.S. at 505).

[20] Public Law 90-40, approved June 30, 1967, § 1(8), 81 Stat. 104; see 50 U.S.C. App. (Supp. V) 460(b)(3).

presidential regulation as early as 1940,[21] had, prior to 1967, been limited specifically to non-military personnel (see 32 C.F.R. (1967 Rev.) 1604.71(c)), in evident deference to the Act's instructions to establish such "*civilian* local boards, *civilian* appeal boards, and such other *civilian* agencies, including agencies of appeal" (emphasis added) as may be necessary (50 U.S.C. App. 460 (b)(3)). Recognizing that this prohibition was making it "difficult to secure qualified appeal agents" (S. Rep. No. 209, *supra*, p. 5; see also H. Rep. 267, p. 46), considered to be "important to the System" (H. Rep. No. 267, *supra*, p. 46), both the Senate and House Armed Services Committees, in recommending enactment of the quoted proviso, stressed that "appeal agents and advisers to registrants[22] can

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[21] The pertinent regulations were, successively, 32 C.F.R. (1940 Supp.) 601.135, 32 C.F.R. (1941 Supp.) 603.71, and 32 C.F.R. (1949 ed.) 1604.71.

[22] Since 1948 the Director of Selective Service has been authorized to appoint for any local board, upon the recommendation of the State Director, one or more officials (in addition to government appeal agents) known as "advisors to registrants," whose function it is to "advise and assist registrants in the preparation of questionnaires and other selective service forms and * * * on other matters relating to their liabilities under the selective service law" (32 C.F.R. 1604.41). Between 1948 and 1955, each local board was required to have an advisor (32 C.F.R. 604.41, as promulgated by Exec. Ord. No. 9979 of July 20, 1948, 13 Fed. Reg. 4179; 32 C.F.R. (1951 Rev.) 1604.41). Since February 3, 1955, appointment of these officials has been optional (32 C.F.R. 1604.41, as amended by Exec. Ord. No. 10594 of January 31, 1955, 20 Fed. Reg. 735). Under the 1940 Act, three-member boards of lawyers known as "advisory boards for registrants" performed the same functions now performed by the individual advisors (32 C.F.R. (1940 Supp.) 601.145; 32 C.F.R. (1943 Cum. Supp.) 603.41).

be of substantial assistance to * * * [registrants] in providing a full understanding of their rights and responsibilities under the law and in encouraging a full exercise of their procedural rights" [23] (S. Rep. No. 209, *supra*, p. 5; see also H. Rep. No. 267, *supra*, p. 46).

Plainly implicit, therefore, in the enactment by Congress of legislation easing eligibility requirements for appeal agents is its determination to meet, from within the Selective Service System itself, the recognized needs of registrants for legal advice and assistance in contesting assigned draft classifications. Standing alone, we submit, this is satisfactory evidence of congressional ratification of the regulatory prohibition against representation by outside counsel sufficient to warrant reversal of the decision below. Cf. *Hannah* v. *Larche*, *supra*, 363 U.S. at 430-433. When viewed in conjunction with the flat refusals by both the House and Senate to afford registrants a statutory right to representation at local board proceedings when the issue was specifically raised in

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[23] The government appeal agent is required by regulation to appeal on a registrant's behalf from any classification brought to his attention which in his opinion should be reviewed; to attend local board meetings upon the board's request; to suggest reopening where this appears to him to be appropriate; to advise the board as to the law and interpret the regulations for it upon request; and to "be equally diligent in protecting the interests of the Government and the rights of the registrant in all matters" (32 C.F.R. 1604.71(d)), the latter a provision questioned by the court below (see A. 41). An appeal agent must, "whenever possible," be "a person with legal training and experience" (32 C.F.R. 1604.71(c)).

1967, there should be no lingering doubts as to the adequacy of the congressional authorization of the challenged regulation.

It is significant that not even passing mention was made by the district court of this quite persuasive evidence of congressional intent. Had the court below taken this into account, it seems inconceivable that it could have reached the conclusion it did, for a more explicit and contemporaneous indication of Congress' attitude on the question of representation by counsel at personal board appearances is difficult to perceive. Given this legislative history, much of the court's discussion becomes irrelevant, and the decision below, to the extent that it rests on a finding of lack of statutory authorization under the Selective Service Act, as distinguished from constitutional grounds, is erroneous. It is, therefore, to the constitutional argument for invalidation of the regulation at issue, as intimated by the court below (see *supra*, pp. 5-6), that we now turn.

B. *The regulation is not inconsistent with due process.*

As a consequence of its holding that statutory authorization for 32 C.F.R. 1624.1(b) was wanting, the district court found it unnecessary to reach the question of the regulation's constitutional validity and decide specifically that denial of counsel at local board proceedings failed to comport with traditional safeguards of procedural due process. Nevertheless, because the court below suggested that the challenged regulation is of "doubtful constitutionality" (A. 40) in such terms as to evince its view that the provision

is in fact unconstitutional (A. 37-42), it would appear appropriate for the Court also to decide the important constitutional question presented. Postponement of consideration of this issue to a subsequent appeal, taken from what would be the inevitable decision of the district court on a remand, is, we submit, unwarranted. See, *e.g.*, *Mills* v. *Alabama*, 384 U.S. 214, 217.

The constitutional issue arises under the Fifth Amendment—whether denial of counsel in the context of a personal draft board appearance offends those fundamental considerations of fairness that are epitomized in the due process concept. The Sixth Amendment right of "accused" persons, in all "criminal prosecutions," to have "the assistance of counsel for * * * [their] defence"[24] is not in issue here. See *Camp* v. *United States*, 413 F. 2d 419, 421-422 (C.A. 5), certiorari denied, 396 U.S. 968; *McCoy* v. *United States*, 403 F.2d 896, 904 (C.A. 5); *United States* v. *Dicks*, 392 F.2d 524, 528 (C.A. 4); *Nickerson* v. *United States*, 391 F.2d 760, 762 (C.A. 10), certiorari denied, 392 U.S. 907. The Selective Service process is not an accusatorial or prosecutorial one, none of the proceedings is in any respect criminal in character, and the personal board appearance does not involve an adversary process, much less a trial. Moreover, neither appellee nor the district court suggests that the Sixth Amendment has any applicability.

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[24] Cf. *Gideon* v. *Wainwright*, 372 U.S. 335; *Johnson* v. *Zerbst*, 304 U.S. 458; *Powell* v. *Alabama*, 287 U.S. 45.

1. Assuming *arguendo* that due process requires affording to each registrant dissatisfied with his draft classification an opportunity to appear in person before his local board to discuss possible reclassification,[25] it does not necessarily follow that this same constitutional precept guarantees a right to representation by counsel at such appearances. Cf. *Madera* v. *Board of Education*, 386 F.2d 778, 786-787 (C.A. 2), certiorari denied, 390 U.S. 1028. Heretofore, on the few occasions where this Court has held that a right to counsel is required by the Due Process Clause, the decisions have been premised on a finding that the proceedings involved were by nature adversary or accusatorial and of a judicial or quasi-judicial character. *E.g.*, *In re Gault*, 387 U.S. 1; *Goldberg* v. *Kelly*, 397 U.S. 254.

A personal appearance before a local draft board, however, does not fit into this category. See, *e.g.*, *United States* v. *Sturgis*, 342 F.2d 328, 332 (C.A. 3), certiorari denied, 382 U.S. 879. The non-adversary and non-judicial nature of such an appearance has not only been recognized explicitly by Congress, in exempting Selective Service proceedings from the re-

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[25] Since the registrant was granted a personal appearance in this case, we are not faced with the question whether due process requirements may be satisfied by permitting a complaining registrant to contest his draft board classification (before the local board) only on written submissions, without affording him any opportunity for an *oral* hearing. See *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 275-277.

quirements of the Administrative Procedure Act,[26] but also is implicit in the unbroken line of judicial precedents (excepting only, by dictum, the decision below) sustaining the constitutionality of the questioned regulation. See, *e.g.*, *Cassidy* v. *United States*, No. 20,032, decided June 8, 1970 (C.A. 8); *United States* v. *Evans*, No. 24,451, decided April 30, 1970 (C.A. 9); *Camp* v. *United States*, 413 F.2d 419, 421-422 (C.A. 5), certiorari denied, 396 U.S. 968; *United States* v. *Willis*, 409 F.2d 830, 832 (C.A. 5), certiorari denied, 396 U.S. 864; *Chaney* v. *United States*, 406 F.2d 809, 815-816 (C.A. 5), certiorari denied, 396 U.S. 867; *Merritt* v. *United States*, 401 F.2d 768 (C.A. 5); *United States* v. *Dicks*, 392 F.2d 524, 528 (C.A. 4); *Nickerson* v. *United States*, 391 F.2d 760, 762 (C.A. 10), certiorari denied, 392 U.S. 907; *United States* v. *Mientke*, 387 F.2d 1009 (C.A. 7), certiorari denied, 390 U.S. 1011; *Capson* v. *United States*, 376 F.2d 814 (C.A. 10), certiorari denied, 389 U.S. 901; *United States* v. *Capson*, 347 F.2d 959 (C.A. 10), certiorari denied, 382 U.S. 911; *United States* v. *Sturgis*, *supra*; *Peterson* v. *United States*, 173 F.2d 111, 115 (C.A. 6), certiorari denied, 337 U.S. 925; *United States* v. *Mendoza*, 295 F. Supp. 673, 683-684 (E.D.N.Y.); *United States* v. *Heljenek*, 275 F. Supp. 579, 581 (E.D.Pa.); *United States* v. *Kovalchick*, 255 F. Supp. 826, 827 (E.D.Pa.); *United States* v. *Miller*,

[26] The right of a party to appear in person or "by or with counsel" in an agency proceeding is one of the specific *statutory* rights provided by the Administrative Procedure Act (Section 6(a), 60 Stat. 240, as amended, 5 U.S.C. (Supp. V) 555(b)).

143 F. Supp. 712, 718 (N.D.W.Va.), affirmed, 239 F.2d 148 (C.A. 4).[27]

Invested with the responsibility "of classification of the nation's manpower for service in its defense" (*Ex parte Stanziale*, 138 F.2d 312, 314 (C.A. 3), certiorari denied *sub nom. Stanziale* v. *Paullin, Commanding Officer*, 320 U.S. 797), the Selective Service System has been assigned a task which, as noted in *Stanziale* (138 F.2d at 314),

> differs greatly from the ordinary administrative action affecting an individual or a group. It is country-wide in scope, it includes a large portion of the population and obviously its operation must be both smooth and swift if the public object is to be accomplished. * * *

In these circumstances, it is the sole function of the local draft boards to place each resident in the community available for military service within a given class (32 C.F.R. 1622.1), selected largely on the basis of information furnished (in answers to question-

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[27] There are in addition numerous opinions containing dicta to the same effect. See, *e.g.*, *United States* v. *Tantash*, 409 F.2d 227, 228 (C.A. 9), certiorari denied, 395 U.S. 968; *Haven* v. *United States*, 403 F.2d 384, 385 (C.A. 9), certiorari dismissed, 393 U.S. 1114; *Madera* v. *Board of Education, supra*, 386 F.2d at 787; *Imboden* v. *United States*, 194 F.2d 508, 513 (C.A. 6), certiorari denied, 343 U.S. 957; *Niznik* v. *United States*, 173 F.2d 328, 336 (C.A. 6), certiorari denied, 337 U.S. 925; *United States* v. *Pitt*, 144 F.2d 169, 172 (C.A. 3); *Lehr* v. *United States*, 139 F.2d 919, 922 (C.A. 5); *United States* v. *Richmond*, 274 F. Supp. 43, 63 (C.D. Cal.); *United States* v. *Wierzchucki*, 248 F. Supp. 788, 790 (W.D. Wis.); *United States* v. *Schwartz*, 143 F. Supp. 639, 640 (E.D.N.Y.).

naires and in written supporting statements) by the registrant. The local board "is not composed of experts, real or purported, but of citizens of the neighborhood" in which it operates (*Ex parte Stanziale, supra*, 138 F.2d at 314). It does not adjudicate individual responsibility for a registrant's actions. It does not hold trials or determine anyone's civil or criminal liability. It does not issue findings of fact or rule on questions of law. Nor does it indict, punish or impose any legal sanctions. Cf. *Uffelman* v. *United States*, 230 F.2d 297, 303 (C.A. 9). Rather, the only purpose for its existence is to carry out "the sifting and testing process by which individual eligibility, exemption and deferment are determined with [c]ongressional blueprints and enunciated legislative policy" (*United States* v. *Greene*, 220 F.2d 792, 794 (C.A. 7)).

Moreover, the personal appearance afforded registrants by their local boards, once the registrant has been placed in a given class, is not an evidentiary hearing in which witnesses are called, examined and cross-examined, testimony is stenographically recorded and formal findings of fact and conclusions of law are made. *Ex parte Stanziale, supra*, 138 F.2d at 314-315. It is, instead, an informal proceeding providing a registrant with the opportunity to appear alone to do no more than (32 C.F.R. 1624.2)

> discuss his classification * * * [or] present such further information as he believes will assist the local board in determining his proper classification. * * *

These fundamental differences of nature and purpose between the personal appearance, on the one hand, and the conventional adversary proceeding of a judicial or quasi-judicial character, on the other, were not fully appreciated by the court below. By casting the former in the mold of an accusatorial or prosecutorial proceeding, thereby automatically entitled to the full spectrum of "traditional judicial safeguards" (A. 39), it is clear that the district court was guided more by what it felt to be the generally *desirable* result in a right to counsel case (A. 36-38) than by what the Constitution mandates as a requirement of fundamental fairness in the context of the specific type of proceeding under consideration.

2. It has been recognized repeatedly by this Court that the "differing rules of fair play" encompassed by the elusive concept of due process "[vary] according to specific factual contexts * * * [and] differing types of proceedings" (*Hannah* v. *Larche*, *supra*, 363 U.S. at 442). See also *St. Joseph Stock Yards Co.* v. *United States* 298 U.S. 38, 77 (Brandeis, J., concurring). Thus, whether a registrant is entitled as a matter of right to representation by counsel at a local board appearance depends on a careful balancing of the private interests to be served by striking down the questioned regulatory prohibition and the public need for sustaining its constitutionality. Cf. *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895.

As is apparent from the above summary review of the procedural differences, the reasons most frequently cited for providing an opportunity to have counsel attend a judicial or quasi-judicial proceeding—*i.e.*, so he can prepare and submit a defense, assist his client in confronting his accusers, examine and cross-examine witnesses, make skilled inquiry into the facts, cope with problems of law, insist upon the regularity of procedures and participate meaningfully in the dispositional decision (cf. *In re Gault*, *supra*, 387 U.S. at 36, 38, n. 65)—are not applicable with respect to local board appearances. Nor can it be seriously argued that the presence of counsel is essential to the development of a suitable record for purposes of appeal to the appeal board.[28]

Indeed, the court below did not suggest otherwise. Rather, it focused on the communicative skills of legal counsel as a basis for permitting registrants to be

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[28] While the regulations preclude representation by counsel at the appearance itself, there is no restriction placed on the use of legal services by the registrant in the preparation of Selective Service forms and questionnaires, including any affidavits, written supporting statements and other documentation submitted to the local boards. In addition, counsel may assist in the preparation of the "written summary" of oral information to be given by the registrant at his personal appearance (32 C.F.R. 1624.2(b); see A. 24-27). All written submissions to the local board are placed in the registrant's file, and it is this file alone which is considered by the appeal board in its *de novo* review of the local board classification (32 C.F.R. 1626.24). There is no transcript made of the local board proceedings. It should be added that those unable to afford counsel to assist in the preparation of necessary papers have access to the services of both the government appeal agents and advisors to registrants (see *supra*, pp. 31-33).

represented before their local boards. Thus, in the district court's view, an opportunity should be provided for counsel to attend draft classification discussions so the inarticulate registrant can be "articulately represented"; so counsel can clarify "any inconsistencies or vagaries in the registrant's testimony"; so the local board can be left with a more "complete portrayal of the registrant's relevant beliefs"; and, in the final analysis, so the "elements of a conscientious objector claim" can be related by counsel "to what the registrant has said" and special emphasis can be given to "why the registrant should be believed" (A. 39-40).

At best, such an argument is conjectural. It presupposes an inability on the registrant's part to articulate clearly his own conscientious objection to war [29] and assumes some special ability on the part of counsel to give expression to a registrant's beliefs in a manner more meaningful than the expression of those beliefs by the registrant himself. In both respects, such a view is suspect. Cf. *Madera* v. *Board of Education*, *supra*, 386 F.2d at 788. In any event, even assuming that the presence of counsel might provide a more articulate and meaningful verbal presentation of the registrant's claim, that hardly means that the regulatory denial of an opportunity to be represented at local board proceedings so af-

[29] Since inquiry into a conscientious objector claim goes to the "state of mind" of the registrant, it does not appear unreasonable to presume that the registrant alone is best able to convey to the local board the way he feels, how he arrived at his beliefs and the sincerity of his conviction.

fects the fundamental fairness of the personal appearance as to be inconsistent with the requirements of due process.[30] Moreover, when this conjectural advantage to registrants is properly viewed in the perspective of the consequent burdens imposed thereby on the sole function of the Selective Service process—to provide manpower for the Armed Forces of the United States—any lingering doubts as to the regulation's constitutionality should disappear.

To open the door of local draft board appearances to legal counsel would inevitably have the effect of permitting "precisely the kind of 'litigious interruptions of procedures to provide necessary military manpower' * * * which Congress sought to prevent" in enacting the Selective Service Act. *Clark* v. *Gabriel*, 393 U.S. 256, 258-259. Cf. *Falbo* v. *United States*, 320 U.S. 549, 554; *Estep* v. *United States*, 327 U.S. 114, 137 (Frankfurter, J., concurring); *Oestereich* v. *Selective Service Board*, 393 U.S. 233,

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[30] In this regard, it is relevant to recall that the "oral hearing" afforded a registrant is fully supported by written submissions, including a written summation of oral statements to be made before the local board. To the extent, therefore, that a registrant does have difficulty articulating his claim, any questions remaining in the minds of board members can be answered by reference to the registrant's written responses to Selective Service questionnaires, affidavits, supporting statements (from counsel and others) attesting to the registrant's sincerity, and the written summary (which can be, and in this case presumably was, prepared by counsel). In addition, for purposes of clarification, the board may well call a government appeal agent into the proceeding to assist the registrant in his oral statements and, at the same time, assist the board members in understanding the claim (32 C.F.R. 1604.71(d)(2) and (5)).

241 (Harlan, J., concurring). Discussion of a registrant's classification, or the submission of additional information, could no longer be conducted on an informal basis. Rather, the proceeding, while an administrative one, would be turned into a process of litigating the particular claim to deferment or exemption status.[31] Matters with which the local board would not be equipped to deal, and which would divert it from accomplishing the purpose for which it was established (see, *e.g.*, *Welsh* v. *United States*, No. 76, 1969 Term, decided June 15, 1970; *Mulloy* v. *United States*, No. 655, 1969 Term, decided June 15, 1970), would predictably be interjected by counsel. The delay occasioned by such tactics would be considerable, and could well have such a disruptive effect that the present draft-by-lottery system would be unworkable.[32] In short, the inevitable result might

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[31] While the discussion here has been in the context of a claim to conscientious objector status, the arguments presented apply with equal force where the personal appearance is requested by a claimant to dependency, occupational or student deferment status, or, for that matter, where it is based on any other cognizable claim.

[32] Under the present lottery system of induction, those registrants drawing the higher numbers (perhaps any number over 250) have little chance of being drafted at all during their year of primary exposure. If some of those assigned low numbers in the lottery, however, are able with the assistance of counsel to delay substantially their induction, local boards will be forced to fill their quotas by calling up registrants holding higher numbers who claim no deferment or exemption status, but who by virtue of the draw should not be called ahead of those delaying their induction. Thus, the whole underlying purpose of the draft-by-lottery system is jeopardized.

be little short of the "constructive paralysis of the Selective Service System in the performance of its mission of procurement of manpower for the Department of Defense." [33] In these circumstances, the private interests of registrants in having their deferment or exemption claims "articulated" are relatively less significant when compared with the public need for the orderly, essentially impartial, and speedy processing of men for induction into military service.

Nor should the collateral consequences likely to flow from a decision to confer a right to counsel on those registrants requesting a personal appearance be overlooked. In all probability, the local board members, being for the most part laymen (32 C.F.R. 1604.52), ill-equipped to cope with intricate legal questions (cf. *Oestereich* v. *Selective Service Board*, *supra*, 393 U.S. at 242 (Harlan, J., concurring)), would insist that they too need representation by

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[33] This assessment was made by General Lewis B. Hershey, then Director of the Selective Service System, and relates directly to the decision below. See letter dated October 3, 1969 from General Hershey to the Attorney General, attached hereto as Appendix C. It has been estimated by the System that the number of personal appearances throughout the United States during the year ending September 30, 1969 was between 190,000 and 210,000, with approximately 28,000 to 30,000 of these involving claimants to conscientious objector status. See letter dated October 7, 1969, from Associate General Counsel, Selective Service System, to Acting Chief of the Administrative Regulations Section, Criminal Division, Department of Justice, attached hereto as Appendix D.

counsel.[34] Thus, the personal appearance would necessarily be transformed into a full *adversary* proceeding. In this context, serious questions not in issue under present procedures would become ripe for consideration. For example, should the registrant be permitted to subpoena, confront and cross-examine witnesses (cf. *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 269-270)?[35] Must the proceeding be stenographically recorded?[36] And, should the local board be required to state on the record its reasons for assigning a given classification and indicate the evidence on which it relied (cf. *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 271)?[37] Moreover, there is the serious question

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[34] While the government appeal agent is required to "attend such local board meetings as the local board may request" (32 C.F.R. 1604.71(d)(2)), his duties to both the board and the registrant (32 C.F.R. 1604.71(d)(5)) may well prompt the board under the circumstances to desire independent counsel.

[35] The regulation now provides that "[n]o person other than a registrant shall have the right to appear in person before the local board * * *" (32 C.F.R. 1624.1(b)).

[36] Cf. the request of appellee's attorney in this case (A. 12-13). If the proceeding is to be recorded, would something like a court reporter system be necessary? Would indigent registrants be entitled to free transcripts? Cf. *Hardy* v. *United States*, 375 U.S. 277; *Coppedge* v. *United States*, 369 U.S. 438, 446.

[37] The traditional rule, first laid down by this Court (*Estep* v. *United States*, 327 U.S. 114, 122-123; *Dickinson* v. *United States*, 346 U.S. 389, 394; *Witmer* v. *United States*, 348 U.S. 375, 380-381), and now codified by statute (50 U.S.C. App. (Supp. V) 460(b)(3)), has been that the classification assigned by the local board is valid and not subject to review if it has a "basis in fact" discoverable from the record.

whether the right conferred contemplates the appointment of counsel for indigent registrants unable to afford retained counsel.[38] If so, tangential considerations come to mind—*e.g.*, whether counsel should be appointed by a local board of laymen, and whether he should be compensated, or, like board members, be expected to serve without compensation.

The far-reaching implication is clear—a judicial or quasi-judicial atmosphere, which Congress explicitly recognized as being alien to the proper functioning of the Selective Service System, would ultimately so pervade the entire induction machinery as to make the achievement of its objective difficult if not impossible. Cf. *Estep* v. *United States*, *supra*, 327 U.S. at 137-141 (Frankfurter, J., concurring). Against this background, the decision to deny registrants representation by counsel at personal appearances before their local boards meets the requirements of due process.

3. Nor are we able to find any decision of this Court which lends support to a contrary conclusion. *In re Gault*, 387 U.S. 1, on which the district court placed heavy reliance (A. 32, 36, 37), is wholly inapposite. There the juvenile proceeding in question was by nature *accusatorial*, differing from an ordinary criminal trial only in regard to the age of the accused and the correctional as distinguished from

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[38] Cf. *Gideon* v. *Wainwright*, 372 U.S. 335, 344; *Miranda* v. *Arizona*, 384 U.S. 436, 472-473. But see *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 270 (welfare recipient has due process right to retained but not appointed counsel at hearing on termination of benefits).

punitive theory of the juvenile's commitment (387 U.S. at 36). Thus, the rationale underlying *Gideon* v. *Wainwright*, 372 U.S. 335, was applicable there. But it was only in this adversary and potentially punitive context that the Court conferred on a juvenile charged with delinquent behavior a right under the Due Process Clause to a hearing, at which he was entitle to be represented by counsel, before he could be committed to a special institution for juvenile delinquents.

Goldberg v. *Kelly*, 397 U.S. 254, is equally distinguishable, and on similar grounds. There the proceeding involved, while not accusatorial, was of a conventional *adversary* character. Thus, while "a particular order of proof or mode of offering evidence" was not required (397 U.S. at 269), the welfare recipient involved was "given an opportunity to confront and cross-examine the witnesses" (397 U.S. at 270), the decision as to termination of benefit payments had to "rest solely on the legal rules and evidence adduced at the hearing" (397 U.S. at 271), and the "decision maker" was required to "state the reasons for his determination and indicate the evidence he relied on" (397 U.S. at 271). In conferring on the welfare recipient a due process right to be represented by retained counsel, the Court, citing *Powell* v. *Alabama*, 287 U.S. 45, 68-69,[39] made spe-

[39] This was a criminal case (charging a capital offense) raising the question of whether an accused defendant was entitled to representation by appointed counsel under the Due Process Clause of the Fourteenth Amendment. The portion of the *Powell* opinion relied on by the Court in *Gold-*

cial mention of the fact that in an evidentiary hearing of the type contemplated there was a need for counsel to be present to help "delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient" (397 U.S. at 270-271). Extension of that holding to the present case, involving a non-adversary proceeding where no such need exists (see *supra*, p. 41), is, we submit, clearly not warranted.

A decision by this Court more nearly in point than either *Gault* or *Goldberg*, and one which lends support to the position taken here, is *United States* v. *Nugent*, 346 U.S. 1. Although not a "right to counsel" case, as the court below noted (A. 35), *Nugent* did call into question, on both statutory and constitutional due process grounds, certain Selective Service pre-induction procedures as applied to a claimant to conscientious objector status.[40] In concluding that the

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berg included a comprehensive discussion of why the right to counsel should be afforded all *defendants* at a hearing to determine guilt or innocence as a matter of constitutional due process. The *Powell* Court concluded that, "[i]f in *any case*, civil or criminal, a state or federal *court* were arbitrarily to refuse to hear a party by counsel * * *, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense" (287 U.S. at 69) (emphasis added).

[40] The case arose under the Selective Service Act of 1948, which provided that all appeals relating to a conscientious objector claim would be referred by the appeal board to the Department of Justice for "appropriate inquiry" and a "hearing" (see Section 6(j) of 1948 Act (50 U.S.C. App. (1964 ed.) 456(j)). This "6(j) hearing" was eliminated from the

statutory requirement for a Department of Justice "hearing" did not contemplate affording to a claimant the right to make "an all-out collateral attack at the hearing on the testimony obtained in * * * prehearing investigation" (346 U.S. at 9), the Court, as suggested below (A. 34-35), was persuaded largely by the fact that the "6(j) hearing" was intended by Congress merely "to render an auxiliary service to the appeal board" (346 U.S. at 8). In these circumstances, it was determined that the Department's refusal to produce FBI investigatory reports or identify adverse witnesses at such an auxiliary hearing was not outside the scope of the statutory authority granted by Congress, notwithstanding the absence of any explicit reference in the Act itself authorizing such an approach.[41]

Act by the 1967 amendments. In *Nugent*, the precise issue was whether a refusal by the Department of Justice at such a "hearing" to turn over FBI investigatory reports or identify the names of parties interviewed pursuant to its pre-hearing investigations was in violation of the claimant's rights under the statute to a "hearing" as provided in Section 6(j) or, in the alternative, contravened procedural due process requirements of the Fifth Amendment.

[41] The dissenting opinion by Mr. Justice Frankfurter, quoted in part by the court below (A. 36), was directed solely to this part of the decision—that is, to the "construction of congressional language" (346 U.S. at 12)—and not to the Court's determination under the Due Process Clause. Thus, he stated: "And, of course, only within narrow limits may courts reject a procedure, devised by Congress, on constitutional grounds. The Due Process Clause cannot be bent to what a judge may privately think is wisdom in respecting dissident views" (346 U.S. at 12).

Turning then to the constitutional issue,[42] the *Nugent* Court adopted the approach we urge should be applied in the present case. Recognizing that Selective Service procedures need to be "adequate to do justice in cases where the sincerity of another's religious convictions is the ultimate factual issue" the Court emphasized that "these procedures must be geared to meet the imperative needs of mobilization and national vigilance—when there is no time for 'litigious interruption'" (346 U.S. at 10). In this context, it upheld the Department's refusal in a "6 (j) hearing" to produce FBI reports and identify adverse witnesses as consistent with the fundamental considerations of fairness embodied in the concept of due process. A similar result would seem to follow here.[43]

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[42] The suggestion by the district court (A. 35) that the rationale in *Nugent* was not followed in *Greene* v. *McElroy*, 360 U.S. 474, is misleading. In *Greene* the Court was unable to find congressional authorization for the Department of Defense's refusal at a hearing to produce classified information or identify adverse witnesses; accordingly, it never reached the constitutional question.

[43] In suggesting that a different result is required in this case because "now the hearing before the board is determinative" (A. 35), the court below failed to separate the discussion in *Nugent* on the "authorization issue" from the Court's consideration of the constitutional question. Moreover, the court below appears to have ignored the fact that procedures at local board proceedings have undergone no basic change since the *Nugent* decision. Thus, to the extent that personal appearances might "now" be "determinative" hearings, they were then. In this regard, it is relevant to note that the Court in *Nugent* made explicit mention of the function

Also supporting this view is the decision by this Court in *In re Groban*, 352 U.S. 330, sustaining under the Due Process Clause an inquiry by the Ohio State Fire Marshal into the causes of a fire, notwithstanding the denial to subpoenaed witnesses (on whose premises the fire occurred) of representation by counsel. There the guiding consideration was that the essential purpose of the Fire Marshal's inquiry was not "to adjudicate appellants' responsibilities for the fire," but to pursue a legislative policy of fire prevention by determining "the causes and circumstances of the fire" (352 U.S. at 332). Despite the fact that the Fire Marshal had authority, after questioning a witness, to arrest him if he believed there was sufficient evidence to support a charge of arson, the Court held (352 U.S. at 334):

> We cannot say that this determination [to deny witnesses representation by counsel at a Fire Marshal's inquiry] is unreasonable. The presence of advisors to witnesses might easily so far encumber an investigatory proceeding as to make it unworkable or unwieldy. And with so weighty a public interest as fire prevention to protect, we cannot hold that the balance has been set in such a way as to be contrary to "fundamental principles of liberty and justice." * * *

The same rationale was applied in *Anonymous* v. *Baker*, 360 U.S. 287, involving a denial of represen-

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of local boards in the induction process and even cited with apparent approval "32 C.F.R. (1949 ed.) Part 1624" (346 U.S. at 8), the first section of which contains the denial of counsel prohibition in question in this case. Cf. *Uffelman* v. *United States*, *supra*, 230 F.2d at 303.

tation by counsel to subpoenaed witnesses appearing before "a state judicial [i]nquiry into alleged improper practices at the local bar" (360 U.S. at 288). In upholding the constitutionality of the challenged procedure, the Court, following *Groban*, emphasized that the inquiry was a non-adversary one which the appellants were requested to attend not as potential accused but "solely as witnesses" (360 U.S. at 298)." See also *Madera* v. *Board of Education, supra.*

In sum, precedent combines with considerations of practicality to argue strongly against a right to counsel at local board appearances as a matter of constitutional due process. To the extent that the decision below intimates that a contrary conclusion on this issue is proper, it is incorrect and should be overturned by this Court.

" The Court, in both *Groban* and *Anonymous* v. *Baker*, made reference by way of analogy to a grand jury inquiry, where a witness "cannot insist, as a matter of constitutional right, on being represented by his counsel" (352 U.S. at 333; see also 360 U.S. at 292).

CONCLUSION

For the reasons stated, the case should be transferred to the court of appeals for consideration of the merits of the appeal by that court in the first instance. If the Court concludes, however, that it has jurisdiction over this direct appeal, the judgment of the district court should be reversed and the case remanded to that court with directions to reinstate the indictment.

Respectfully submitted.

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Attorneys.

JULY 1970.

APPENDIX A

1. 18 U.S.C. 3731 provides in pertinent part:

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

* * * *

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

* * * *

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to

hear and determine the same as if the appeal had been taken to that court in the first instance.

* * * *

2. Section 10(b) of the Military Selective Service Act of 1967,[46] 62 Stat. 619-620, as amended, 81 Stat. 104 (50 U.S.C. App. 460(b)), provides in pertinent part:

(b) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this title;

* * * *

(3) to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title, together with such other duties as may be assigned under this title: *Provided*, That no person shall be disqualified from serving as a counselor to registrants, including service as Government appeal agent, because of his membership in a Reserve component of the Armed Forces. * * * Such local boards

[46] Formerly known as the "Universal Military Training and Service Act" and, before that, as the "Selective Service Act of 1948" (62 Stat. 604, 65 Stat. 75).

> * * * shall, under rules and regulations prescribed by the President, have the power * * * to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. * * *

* * * *

3. 32 C.F.R. 1604.41, 1604.71, 1624.1, and 1624.2 provide:

§ 1604.41 *Appointment and duties.*

Advisors to registrants may be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

* * * *

§ 1604.71 *Appointment and duties.*

(a) For each local board a government appeal agent shall be appointed by the President upon recommendation of the Governor.

(b) One or more associate government appeal agents may be appointed by the President for each local board when either the government appeal agent appointed for that board or the local

board requests such assistance and the Governor, being of the opinion that the circumstances warrant such action, recommends appointment. Whenever an intercounty local board is established an associate government appeal agent shall be appointed by the President, upon recommendation of the Governor, for each county included within the local board area.

(c) Each government appeal agent and associate government appeal agent shall be, whenever possible, a person with legal training and experience.

(d) It shall be the duty of the government appeal agent and in his absence or inability to act or at his direction, the duty of the associate government appeal agent:

(1) To appeal, as prescribed by the regulations in this chapter, from any classification of a registrant by the local board which is brought to his attention and, in his opinion, should be reviewed by the appeal board.

(2) To attend such local board meetings as the local board may request him to attend.

(3) To suggest to the local board a reopening of any case where the interests of justice, in his opinion, require such action and to submit to the local board, with such suggestion, the information obtained by his investigation of the case which has caused him to arrive at his decision that the case should be reconsidered.

(4) To render such assistance to the local board as it may request by advising the members and interpreting for them laws, regulations, and other directives.

(5) To be equally diligent in protecting the interests of the Government and the rights of the registrant in all matters.

(e) The State Director of Selective Service may authorize any duly appointed government appeal agent or associate government appeal agent to perform such duties for any local board within the state.

* * * *

§ 1624.1 *Opportunity to appear in person.*

(a) Every registrant after his classification is determined by the local board, except a classification which is determined upon an appearance before the local board under the provisions of this part, shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 30 days after the local board has mailed a Notice of Classification (SSS Form 110) to him. Such 30-day period may not be extended.

(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: *Provided*, That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: *And provided further*, That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.

§ 1624.2 *Appearance before local board.*

(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. A notation that he

has appeared shall be entered on the Classification Questionnaire (SSS Form No. 100).

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing by the registrant and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and, if the local board determines that such new information justifies a change in the registrant's classification, the local board shall reopen and classify the registrant anew. If the local board determines that such new information does not justify a change in the registrant's classification, it shall not reopen the registrant's classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant,

or determines not to reopen the registrant's classification, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of § 1623.4 of this chapter.

(e) Each such classification or determination not to reopen the classification made under this section shall be followed by the same right of appeal as in the case of an original classification.

APPENDIX B

Review of the Administration and Operation of the Selective Service System, Hearings before the Committee on Armed Services of the House of Representatives, 89th Cong., 2d Sess., June 22, 23, 24, 28, 29, and 30, 1966 (Doc. No. 75), pp. 9889-9890, 9916, 9920-9922, 9984-9988:

* * * *

CORRESPONDENCE SUBMITTED BY HON. MELVIN R. LAIRD, REPRESENTATIVE FROM WISCONSIN

JULY 7, 1966.

Hon. MELVIN R. LAIRD,
House of Representatives,
Washington, D.C.

DEAR MR. LAIRD: I have your recent letter in which you forwarded for my information the views of your constituent Mr. John D. Day of Marshfield, Wisconsin, concerning a desirable change in Selective Service regulations.

Mr. Day believes that the present policy of Selective Service regulations which preclude a registrant's representation by legal counsel before the board is inequitable and recommends that this right be granted the registrant.

I fully appreciate the views of Mr. Day and, therefore, will make them available to the Committee for its consideration by virtue of its inclusion in the record.

Sincerely,

L. MENDEL RIVERS, *Chairman.*

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES,
Washington, D.C., June 30, 1966.

Hon. L. MENDEL RIVERS,
Chairman,
House Armed Services Committee,
Rayburn House Office Building,
Washington, D.C.

(Attention: Mr. Slatinshek).

DEAR CHAIRMAN: Enclosed is a letter from my constituent, John D. Day, Attorney at Law, Marshfield, Wisconsin, enclosing a copy of one addressed to Jerry J. Kobs, Spencer, Wisconsin, stating that Selective Service regulations do not provide for registrants to be represented before the local board by legal counsel.

I would appreciate consideration during your Committee's current review of Selective Service policies and procedures of Mr. Day's recommendation that draftees be given an opportunity to appear before their local boards with legal counsel of their choice.

With best wishes and kindest personal regards, I am.

Sincerely yours,

MELVIN R. LAIRD,
Member of Congress.

HOERL, DAY & KAMPS,
Marshfield, Wis., June 27, 1966.

Congressman MELVIN R. LAIRD,
Rayburn House Office Building,
Washington, D.C.:

DEAR SIR: I am enclosing a copy of a letter which a client of mine has received from the Marathon County Local Board 38 relative to a request for a personal appearance before the board concerning a draft classification.

I am assuming that they are correct in their statement of the regulations. However, it appears to me that a citizen should be entitled to be represented by counsel of his choice, at any hearing before any admisitrative [*sic*] body and, with no reflection on Mr. Tinkham, who of course is an excellent attorney, it would appear to me that on a broad basis, the idea that a person requesting a change in classification should seek advise [*sic*] from a Government appeal agent is somewhat like defendants in court cases obtaining advise from the prosecuting attorney.

The reason for this letter is that I understand that at the present time from reading the papers there is an investigation being conducted by Congress and hearings being held on the Selective Service System. I would suggest that one very fundamental right to be given the draftee should be an opportunity to appear before the board or anyone else with any counsel he wishes to hire and I would appreciate it if you bring this to the

attention of the committee making the current investigation.

Thank you.

Yours very truly,

JOHN D. DAY.

MARATHON COUNTY LOCAL
BOARD 38,
SELECTIVE SERVICE SYSTEM,
Wausau, Wis., June 23, 1966.

Mr. JERRY J. KOBS,
Spencer, Wis.:

DEAR MR. KOBS: We are in receipt of your request for a personal appearance which was filed on your behalf by Hoerl, Day & Kamps, together with your mother's request for appeal of classification.

Your request for personal appearance specified that you wished your attorney to appear with you. Selective Service regulations provide that no registrant may be represented before the local board by anyone acting as attorney or legal counsel. However, we have requested that the Government appeal agent, Attorney Richard P. Tinkham, be present at this appearance, and he will offer you whatever advice you desire.

If, after this personal appearance, your hardship deferment is not granted, you will receive a new notice of classification and your file will be forwarded to the appeal board based on your mother's request.

For the local board:

ELIZABETH WILSON, *Clerk.*

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* * * *

STATEMENT OF HON. WILLIAM F. RYAN,
REPRESENTATIVE FROM NEW YORK

* * * *

Mr. Chairman, a second major deficiency in the operation of the present system is the composition and operation of the boards of appeals.

* * * *

The role of the 95 appeal boards in the Selective Service System can be extremely important. The registrant has an absolute right of appeal, and classification by the appeal board is an independent, de novo action. Indeed, in some areas the appeals board exercises a great deal of independent discretion. During 1965 in the District of Columbia, for example, the board reversed 49 of the 110 cases which were appealed.

The appeals system should have at least two primary functions. First, it should offer the registrant an opportunity to get a new full and fair hearing on his record. And second, it should serve—as General Hershey says it does serve—to bring a measure of uniformity to an essentially diverse system.

The procedures followed by the appeals board, however, assure neither a fair review of a man's record, nor national uniformity of standards.

In appealing his classification, a young man should have the right to a full review of his record. That is the purpose of the boards. Yet, under the present regulations, registrants are not permitted to have the advantage of counsel. Nor is the registrant himself permitted to appear before the board.

Mr. PHILBIN. Your time has expired. If you choose to make a brief summation of your remarks, you may do so.

Mr. RYAN. Yes, Mr. Chairman. If I might, I should argue the registrant should have the assistance of counsel in presenting their cases to the board. I think this is very important.

If I may have permission to extend my remarks on this question, of counsel, I would appreciate that.

Mr. PHILBIN. You may extend your remarks in any manner in which you wish, to present it for the record.

(The balance of Mr. Ryan's prepared statement is as follows:)

Consequently, the appeal board review is altogether different from the system of appeals in the courts.

Ideally, I think that registrants should be able to have the assistance of counsel in presenting their case to the appeals board. The chief argument against this seems to be that it would slow down the operation of the draft, and raise thorny and intricate procedural questions and questions of administrative law. But I would point out that of the 2.4 million men classified by the Selective Service System in 1965, only 9,741 took their cases to the appeal boards. Consequently, it would seem that a more thorough appellate procedure would not threaten the operation of the system.

I should also point out that the system does presently employ government appeal agents and advisers to registrants, who are expected to help registrants with technical or legal problems. However, from what information I have been able to obtain from the Selective Service System, it would appear that neither the appeal agents nor the advisers to registrants can be depended on to help the registrants. Their services are voluntary, and in many communi-

ties, according to General Hershey's staff, they appear to do little work at all.

* * * *

In conclusion, it seems clear that one of the strongest criticisms of the Selective Service System is that it is not fair. To some extent, fairness can be assured by establishing a system which resembles the court system in this country. It is for that reason that there are local boards, appeals boards, and a National Appeals Board. But the resemblance to the judicial system is transparently false. The judges are not always impartial; the registrant has no right to counsel; and there is no method of establishing precedent.

Whatever the committee should decide to do about preserving the Selective System System, I strongly urge you to review carefully the selection of the local boards, and the selection and operation of the boards of appeal.

* * * *

Subsequent to the termination of current committee hearings on the draft law, Gen. Lewis B. Hershey, the Director of Selective Service, submitted for the committee's review his summary of the various recommendations and observations made by witnesses who appeared before the committee.

Because of the pertinency of this summary, it is included in the record at this point. However, it must be emphasized that though this summary was requested from General Hershey by the Committee on Armed Services, it does not necessarily reflect the views of the committee.

The material submitted by General Hershey is as follows:

The following are the suggestions, either implied or expressed, identified in our analysis of testimony and statements submitted by Members of the Congress and others before the committee during the selective service posture hearings of 1966.

Those witnesses who made the suggestion are listed after each item.

Not included are suggestions that the present philosophy, policy, and procedures are sound and should be unchanged.

I. Aspects of the functions, responsibility, procedures, and composition of local and appeal boards, and the guidance furnished them were discussed by several members of the Congress.

* * * *

(e) Registrants should have the right to be represented by counsel of their choice before the local board (Rep. Laird) and have counsel and a full hearing before the appeal board. (Rep. Ryan)

* * * *

(Attached, as requested during the selective service posture hearings, are suggestions contained in the testimony presented by various members of the Congress, together with comments on the suggestions by the Director of Selective Service.)

I. Aspects of the functions, responsibility, procedures, and composition of local and appeal

boards, and the guidance furnished them were discussed by several members of the Congress.

* * * *

(e) Registrants should have the right to be represented by counsel of their choice before the local board and have counsel and a full hearing before the appeal board.

The selective service classification procedure involves a determination with respect to the availability of a registrant for military service, made by a board composed of the young man's neighbors who are generally without legal training and always uncompensated. It has been our feeling through the years that procedures should be kept so simple that it would not be necessary to have legal counsel at a hearing; and that it would be unfair to the many who cannot afford to hire attorneys if the sons of other families were permitted to have their cases presented by legal counsel.

On the other hand, it was realized that all registrants should have reasonable access to legal advice. With this in mind, there is attached to each local board a Government Appeal Agent who is, with rare exceptions, an attorney. This official is uncompensated and is charged with the duty of being equally diligent in protecting the interests of the Government and the rights of the registrant in all matters. Each registrant, therefore, has available to him ample assistance, without cost, to aid in determining his rights and obligations under the selective service law.

The provision that no registrant should be represented before the local board by anyone acting as attorney or legal counsel appeared in regulations issued under the 1940, as well as the pres-

ent law. The present provision has been in our regulations since 1948, when it was promulgated by Executive order issued by President Truman.

The Congress has recently recognized the wisdom of this provision. In its report No. 1141 relative to S. 1758, a bill "Providing for the right of persons to be represented in matters before Federal agencies," the Committee on the Judiciary, House of Representatives, said:

"In this connection the committee wishes to make clear that the bill would not affect the operation of the boards of the Selective Service System. The functions performed under the Universal Military Training and Service Act are expressly excluded from the operation of the Administrative Procedure Act, except those relating to public information. Under regulations prescribed by the President a registrant may not be represented before a local board by an attorney. This is because of the large number of registrants involved, the informality of procedures, and the need for a capacity to provide large numbers of men quickly for service. The present bill is designed to do away with special agency bars where Congress has given an affirmative right to representation. It does not extend a right of representation to the Selective Service System, where the right does not now exist."

It is not believed that it would be beneficial to the registrant or his counsel to have the right to appear before the appeal boards. The registrant may appear before the local board and present information, written or oral. Any interested party may present written information to the local board. All of this information is considered by the local board. If the registrant ap-

peals his classification this information is reviewed by the appeal board and it classifies the registrant de novo. The appeal board should consider the same evidence and information that the local board considered. It may come to a different decision based on the facts but it is not believed that oral arguments at this stage are desirable or beneficial. The important thing is the judgment of the appeal board composed of five individuals basing its opinion on a review of all the facts that have been presented and are included in the file. Thus, the registrant, the dependent, the employer, and the Government have had the benefit of the opinions of from three to five local board members, and if there is a dissenting vote at the appeal board level an appeal may be made to the President.

* * * *

APPENDIX C

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1724 F Street N.W.
Washington, D. C. 20435

Office of the Director Address Reply to
The Director of Selective Service

Oct. 3, 1969

The Honorable

The Attorney General

Subject: Thomas William Weller
Criminal No. 42614
SS No. 4-22-44-351

Dear Mr. Attorney General:

The United States District Court for the Northern Judicial District of California, speaking through Judge Robert F. Peckham, on or about September 19, 1969, made an order granting the above defendant's Motion to Dismiss Indictment. The Court based its order upon the fact that denial of Selective Service Local Board No. 22 of the defendant's request to have his attorney present at a meeting of the local board for the purpose of advising the defendant with respect to his rights constituted to denial of a constitutional right.

The effect of this decision, if allowed to stand unchallenged, would be to place an intolerable burden upon the administration of the Selective Service System in the Northern District of California, and, if extended to other jurisdictions, would result in constructive paralysis of the Selective Service System in

the performance of its mission of procurement of manpower for the Department of Defense. The Courts of Appeal of the United States which have considered this question have unanimously held that no such right to counsel on the part of a selective service registrant in his dealings with the Selective Service System exists, and, in doing so have pointed out that the military selection and induction process is neither a punitive process nor an adversary proceeding. In this regard, the following citations, not intended to be inclusive, are furnished:

> *Nickerson* v. *United States*, 391 F.2d 760 (10th Cir.), *cert. denied* 392 U.S. 970 (1968); *United States* v. *Dicks*, 392 F.2d 524 (4th Cir. 1968); *United States* v. *Capson*, 347 F.2d 959 (10th Cir. 1965); *Tantash* v. *United States*, 409 Fed. 2d 227 (9th Cir. 1969); *Haven* v. *United States*, 403 Fed. 2d 384 (9th Cir. 1968).

The Congress of the United States, in enacting and re-enacting the selective service laws during the past twenty-nine years, has been well aware of those provisions of the selective service regulations which discouraged the presence of legal counsel for registrants.

I am, therefore, making this formal request on you, under the authority given to me in Section 12(c) of the Military Selective Service Act of 1967, to proceed as expeditiously as possible in asking for an appeal to the Supreme Court of United States in order that this case may be heard and this vital issue decided by the Supreme Court.

Sincerely yours,

/s/ Lewis B. Hershey
Director

APPENDIX D

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1724 F Street N.W.
Washington, D. C. 20435

Office of the Director — Address Reply to
The Director of Selective Service

Oct. 7, 1969

Mr. John L. Murphy
Acting Chief, Administrative
Regulations Section
Criminal Division
Department of Justice
Washington, D. C.

Attention: Mr. Ezra Friedman

Subject: WELLER, Thomas William
Criminal No. 42614
SS No. 4-22-44-351

Dear Sir:

The Director of Selective Service recently requested that an appeal be taken in the subject case in which the Honorable Robert F. Peckham dismissed a Selective Service Indictment because the defendant was not allowed by his local board to have an attorney present at the personal appearance meeting. By way of illustration of the administrative havoc that would be wrought in the functioning of the Selective Service System if the rule in the subject case were allowed to stand and attorneys be allowed to be present for each personal appearance, the following data as to personal

appearances for a one-year period commencing October 1, 1968, and ending September 30, 1969, is furnished below:

> Based upon a 1% statistical sample taken by the Research and Statistics Division of this Headquarters, the number of personal appearances had by the registrants throughout the United States for the year ending September 30, 1969, is estimated to be between 190,000 and 210,000. Included in the latter figure are all personal appearances made by conscientious objectors which are estimated to be between 28,000 and 30,000.

For The Director,

/s/ Roy R. Bartlett
ROY R. BARTLETT
Lt. Colonel, JAGC
Associate General Counsel

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